

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ESTATE OF DAVID BURKHART,
et al.,

Plaintiffs,

No. C 07-5467 PJH

v.

UNITED STATES OF AMERICA,

**ORDER GRANTING MOTION TO
DISMISS IN PART AND DENYING IT
IN PART**

Defendant.

The motion of defendant United States of America to dismiss the above-entitled action came on for hearing before this court on August 6, 2008. Plaintiffs appeared in propria persona, and defendant appeared by its counsel Assistant United States Attorney Jennifer S. Wang. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion in part and DENIES it in part.

BACKGROUND

This is a case brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, et seq., arising from the death of David Burkhart ("decedent"), and alleging causes of action for medical malpractice, elder abuse, and negligence. Plaintiffs Sally A. Burkhart, decedent's widow, and David T. Burkhart, decedent's son, allege claims for wrongful death, and Sally Burkhart asserts survival claims on behalf of decedent's estate ("the

1 Estate”).

2 Plaintiffs allege that decedent sought medical care at facilities operated by the
3 United States Department of Veterans Affairs (“VA”) for a number of years prior to his
4 death. They assert that in September 2002, decedent was admitted to the VA hospital
5 facility in Menlo Park, California, where he suffered an allergic reaction to medication and
6 “cardiac arrest.” Decedent was transported from Menlo Park to the VA hospital facility in
7 Palo Alto, California, and then to a private nursing facility in San Jose, California. From the
8 private nursing facility, he was transported to the Good Samaritan Hospital in San Jose,
9 where he was admitted “in cardiac arrest.”

10 At some point during the summer of 2003, decedent was again admitted to the VA
11 hospital facility at Palo Alto, for about a week. He then returned to his home. Plaintiffs
12 assert that in September 2003, decedent was driven to the VA hospital facility at Palo Alto
13 “with medical concerns,” but was refused admission. Three days later he returned to the
14 Palo Alto facility and was admitted.

15 Plaintiffs allege that after decedent was examined, VA medical personnel told Sally
16 Burkhart that decedent would not be allowed to stay in the hospital facility. According to
17 plaintiffs, decedent was prescribed a sedative so that he could be transported to the VA
18 facility at Livermore, California. Plaintiffs allege that decedent’s condition deteriorated while
19 he was at the Livermore facility, and that at some point, he was transferred to hospice care
20 at the same facility.

21 On October 26, 2003, decedent was found dead in his bed at the Livermore facility.
22 The death certificate lists the cause of death as “coronary artery disease” and “multi-infarct
23 dementia,” and lists “congestive heart failure, diabetes mellitus, hypertension,
24 osteomyelitis” as conditions contributing to death.

25 On October 21, 2005, the VA received two Form 95 (“Claim for Damage, Injury, or
26 Death”) administrative claim forms claiming wrongful death, and seeking \$2 million. The
27 first Form 95 is dated October 11, 2005, and stamped with a “Received” date of October
28 19, 2005; and the second Form 95 is also dated October 11, 2005, but is stamped with a

1 “Received” date of October 21, 2005. On the first form, Block 2, “Name, Address of
2 claimant and claimant’s personal representative, if any” states “Dave Burkhart Sally.” On
3 the second form, Block 2 states “Dave Burkhart.” On each of the two forms, Block 13a,
4 “Signature of Claimant,” bears the signature “Sally Burkhart.” Plaintiffs allege that the
5 claims were denied in April 2007.

6 On October 26, 2007, Sally Burkhart, claiming to be the personal representative of
7 the Estate, filed the present action, alleging survival claims of medical malpractice, elder
8 neglect, and negligence, against the VA. The United States moved to dismiss the VA from
9 the action on the ground that the United States is the only proper defendant in a FTCA
10 action. The motion was granted on May 14, 2008.

11 On June 4, 2008, plaintiffs filed the first amended complaint (“FAC”). Sally Burkhart
12 and David Burkhart allege wrongful death claims, and Sally Burkhart alleges survival claims
13 on behalf of the Estate. The United States now seeks an order dismissing the FAC for lack
14 of subject matter jurisdiction, for failure to state a claim, and for failure to join necessary
15 parties.

16 DISCUSSION

17 A. Legal Standards

18 Subject matter jurisdiction is fundamental and cannot be waived. Billingsly v. C.I.R.,
19 868 F.2d 1081, 1085 (9th Cir. 1989). The court is under a continuing duty to dismiss an
20 action whenever it appears that the court lacks jurisdiction. Id. On a motion to dismiss
21 under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of
22 demonstrating that subject matter jurisdiction exists over the complaint. See, e.g., Tosco
23 Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001); see also
24 Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). In determining
25 whether it has subject matter jurisdiction, the court is not limited to the allegations of the
26 complaint. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2001). Rather, the court is
27 permitted to look beyond the complaint to extrinsic evidence, and need not assume the
28 truth of the plaintiff’s allegations. Id.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). All allegations of material fact are taken as true. Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). However, the allegations in the complaint “must be enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007). A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. See id. at 1966-67.

Under Federal Rule of Civil Procedure 12(b)(7), a defendant may challenge the complaint’s failure to join a party under Federal Rule of Civil Procedure 19. A Rule 12(b)(7) motion to dismiss for failure to join a party will be granted only if the court determines that joinder of the party is not possible, and that the party is, in fact “indispensable.” Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992). To determine whether Rule 19 requires the joinder of additional parties, the court may consider evidence outside the pleadings. McShan v. Sherrill, 283 F.2d 462, 464 (9th Cir. 1960); Behrens v. Donnelly, 236 F.R.D. 509, 512 (D. Haw. 2006).

B. The United States’ Motion

The United States argues that David Burkhart’s claims should be dismissed for lack of subject matter jurisdiction and for failure to state a claim; that Sally Burkhart’s claims should be dismissed for failure to join necessary parties and for lack of subject matter jurisdiction; and that the survival claims by the Estate should be dismissed for lack of subject matter jurisdiction.

1. David Burkhart’s claims

a. Dismissal for lack of subject matter jurisdiction

The United States asserts that David Burkhart failed to submit an administrative claim to the VA prior to filing suit, and that his claims should be dismissed for lack of subject matter jurisdiction.

1 A district court has no subject matter jurisdiction over a tort claim brought under the
2 FTCA unless the plaintiff first presents a claim to the appropriate agency, and either the
3 claim is denied in writing, or six months pass without any response from the agency. 28
4 U.S.C. § 2675(a). The claim requirement is jurisdictional, and it thus “must be strictly
5 adhered to.” Jerves v. United States, 966 F.2d 517, 521 (9th Cir. 1992). This is particularly
6 so since the FTCA waives sovereign immunity. Any such waiver must be “strictly
7 construed in favor of the United States.” Id.

8 The United States contends that the administrative claim filed by Sally Burkhart does
9 not provide the court with subject matter jurisdiction over David Burkhart’s claims, as each
10 plaintiff is required to file an administrative claim as a prerequisite to filing suit. The United
11 States argues that because Sally Burkhart’s administrative claims were submitted in her
12 own name, and contained no allegations that would have given the VA notice of David
13 Burkhart’s claims, the claims did not provide the VA with adequate notice of David
14 Burkhart’s own, separate, loss.

15 In opposition, plaintiffs assert that because the administrative claim form submitted
16 by Sally Burkhart referenced the name “Dave” in Block 2 (“Name, Address of claimant and
17 claimant’s personal representative, if any”), it should be clear that David Burkhart was also
18 submitting a claim.

19 Plaintiffs also note that the multi-page narrative containing the allegations of
20 malpractice states that “We” provided a nursing home for decedent that was “near our
21 house” and that “We” were never told by the VA that decedent was transferred to hospice
22 care. Plaintiffs argue that when this use of “We” is added to the fact that David Burkhart
23 signed as “son” for decedent’s personal effects, it is clear that Sally Burkhart was not the
24 sole caregiver and not the sole interested party in the claims for harm suffered by
25 decedent.¹

26 It is plainly the intent of the FTCA that if there are multiple claimants, each claimant

27
28 ¹ The court notes, however, that the singular pronoun “I” is used just as frequently in the narrative.

1 must individually satisfy the jurisdictional prerequisite of filing an administrative claim. In
 2 Cadwalder v. United States, 45 F.3d 297 (9th Cir. 1995), the Ninth Circuit noted that “[t]he
 3 plain language of [28 U.S.C. §] 2675(a) requires “the claimant” to “first present the claim to
 4 the appropriate Federal agency.” Id. at 301. The court noted that it had previously ruled, in
 5 a 1984 case, that “section 2675(a) requires the claimant or his legal representative to file
 6 (1) a written statement sufficiently describing the injury to enable the agency to begin its
 7 own investigation, and (2) a sum certain damages claim.” Id. (quoting Warren v. United
 8 States Dept. of Interior Bureau of Land Mgmt., 724 F.2d 776, 780 (9th Cir. 1984) (en
 9 banc)). The court held that the district court lacked subject matter jurisdiction over the
 10 claims of one of the plaintiffs in the civil action because neither that plaintiff nor its legal
 11 representative had filed an administrative claim prior to filing suit. Id.

12 Several other Circuits have ruled that in actions under the FTCA, each claimant
 13 must individually satisfy the jurisdictional prerequisite of filing an administrative claim. See
 14 Turner ex rel. Turner v. United States, 514 F.3d 1194, 1200 (11th Cir. 2008); Haceesa v.
 15 United States, 309 F.3d 722, 734 (10th Cir. 2002); Muth v. United States, 1 F.3d 246, 249
 16 (4th Cir. 1993); Keene Corp. v. United States, 700 F.2d 836, 842 (2nd Cir. 1983).

17 It is generally recognized that Congress had two general purposes in enacting
 18 § 2675(a) – to ease court congestion and avoid unnecessary litigation, while making it
 19 possible for the government to expedite the fair settlement of tort claims brought against it;
 20 and to provide for a more fair and equitable treatment of private individuals and claimants
 21 when they deal with the government or are involved in litigation with the government. See
 22 Shipek v. United States, 752 F.2d 1352, 1354 (9th Cir. 1985). These two purposes are
 23 served when the claim gives the agency sufficient notice to commence investigation, and
 24 the claimant places a value on the claim. Id.

25 The Ninth Circuit has also concluded, however, that “Congress intended section
 26 2675(a)’s notice requirement . . . to be minimal.” Id. (citing Warren, 724 F.2d at 779); see
 27 also id. (citing Avery v. United States, 680 F.2d 608, 610 (9th Cir. 1982) (“a skeletal claim
 28 form, containing only the bare elements of notice of accident and injury and a sum certain

1 representing damages, suffices to overcome an argument that jurisdiction is lacking))).
2 There thus appears to be some tension between the rule that the FTCA's administrative
3 claim requirement must be strictly construed, and the Ninth Circuit's determination that
4 § 2675(a)'s notice requirement is "minimal."

5 At the hearing, plaintiffs clarified that it was their intent that the first Form 95, which
6 lists "Dave Burkhart Sally" in Block 2 as the "Name of Claimant," was to serve as a claim by
7 both David Burkhart and Sally Burkhart. Plaintiffs explained that the first claim form was
8 intended as a joint claim by Sally Burkhart and David Burkart, on behalf of "the family," and
9 that the second claim form was intended as a claim by the Estate.

10 The arguments made by the United States are based on a misconstruction of what
11 was intended by plaintiffs when they filed the two claim forms. Neither the United States
12 (nor, indeed, the court) read the first Form 95 as presenting claims by both Sally Burkhart
13 and David Burkhart, and the second Form 95 as presenting a claim by decedent's Estate.
14 The confusion was compounded by the fact that both decedent and his son are "David
15 Burkhart," and also by the fact that Sally Burkhart signed both forms.

16 While the court cannot find that the first Form 95, which lists "Dave Burkhart Sally"
17 as claimant(s), was objectively sufficient to put the United States on notice of the injury
18 claimed by David Burkhart, or to enable the agency to begin its own investigation, the court
19 does find that David Burkhart should be deemed to have submitted a claim, in light of
20 plaintiff's explanation at the hearing. Remanding the claim to the VA for investigation would
21 be futile, as the VA has already denied the claim which it believed was submitted by Sally
22 Burkhart alone. The court finds, for purposes of the jurisdictional issue only, that the first
23 Form 95 sufficiently identifies the claim as a wrongful death claim, brought by Sally
24 Burkhart and David Burkhart.

25 However, other questions that might have a bearing on the court's jurisdiction
26 remain unanswered. These are, first, whether Sally Burkhart was obligated to state on the
27 Form 95 that she was authorized to sign on David Burkhart's behalf; and second, whether
28 plaintiffs met the "sum certain damages claim" requirement, in view of the fact that only the

1 single lump sum amount of \$2 million was entered in Block 12d ("Total" amount of claim).²

2 The United States has not addressed these issues, and the court does not decide
3 them here. The court finds that the motion to dismiss David Burkhart's wrongful death
4 claim for lack of subject matter jurisdiction should be DENIED. However, the court also
5 finds that the United States should be permitted to again move to dismiss David Burkhart's
6 claims for lack of subject matter jurisdiction, in view of the new understanding of what those
7 claims are. In the course of its renewed motion, the United States should also address the
8 questions identified by the court, above.

9 b. Dismissal for failure to state a claim

10 The United States also contends that David Burkhart fails to state a claim for loss of
11 consortium, because there is no cause of action for parental loss of consortium in
12 California. Plaintiffs do not directly respond to this argument.

13 It is true that there is no cause of action for parental consortium under California law.
14 Borer v. American Airlines, Inc., 19 Cal. 3d 441 (1977). In this case, however, plaintiffs do
15 not allege a separate cause of action for loss of either parental or spousal consortium.³
16 Rather, they allege in each of the three causes of action that "[d]ecedent's immediate
17 family suffered a loss of consortium and companionship as a direct result of the decline in
18 health and resulting death of defendant." FAC ¶¶ 29, 35, 42. The prayer for relief also
19 seeks "damages suffered by [d]ecedent's immediate family for loss of consortium and
20 companionship according to proof."

21 In California, a wrongful death plaintiff may recover two categories of damages –

22
23 ² An additional question is whether the wrongful death claim is time-barred. Plaintiffs
24 allege in the FAC that the VA denied the administrative claims in April 2007. The FAC, which
25 asserted the wrongful death claims for the first time, was filed in June 2008. Under 28 U.S.C.
26 § 2401(b), "[a] tort claim against the United States shall be forever barred unless it is presented
27 in writing to the appropriate Federal agency within two years after such claim accrues or unless
28 action is begun within six months after the date of mailing, by certified or registered mail, of
notice of final denial of the claim by the agency to which it was presented."

³ Moreover, a loss-of-consortium claim is generally brought in the context of a personal
injury action, not a wrongful death action. See, e.g., Krouse v. Graham, 19 Cal. 3d 59, 68-70
(1977).

1 economic and non-economic. Quiroz v. Seventh Ave. Center, 140 Cal. App. 4th 1256,
2 1264 n.2 (2006). Non-economic damages include the loss of, for example, the decedent's
3 "love, companionship, comfort, care, assistance, protection, affection, society, [and] moral
4 support." Id. (quoting CACI No. 3921).

5 Because plaintiffs are permitted to seek what is akin to loss-of-consortium damages
6 as part of their wrongful death claims, the court finds that the motion must be DENIED.

7 2. Sally Burkhart's claims

8 a. Dismissal for failure to join parties under Rule 19

9 The United States argues that the wrongful death claims should be dismissed
10 because decedent's heirs have not all been joined. In addition to David Burkhart, decedent
11 is survived by two other adult children – William B. Burkhart and Lisa A. Haran.

12 In a motion to dismiss for failure to join a party under Rule 19, the court must find
13 that the absent person is necessary as a "person to be joined if feasible" under Rule
14 19(a)(1) and (2). Schnabel v. Lui, 302 F.3d 1023, 1029-30 (9th Cir. 2002). Although Rule
15 19 no longer uses either "necessary" or "indispensable" to define those who should or must
16 be joined under the terms of the rule, those terms remain as terms of art used by the courts
17 and commentators. In general, "necessary" refers to a party that should be joined if
18 feasible. "Indispensable" refers to a party whose participation is so important to the
19 resolution of the case that, if the party is not joined, the suit must be dismissed.

20 See Disabled Rights Action Committee v. Las Vegas Events, Inc., 375 F.3d 861, 867 n.5
21 (9th Cir. 2004).

22 When considering whether to dismiss an action for failure to join a purportedly
23 indispensable party, the court must follow the three-step process set forth in Rule 19. The
24 court must first determine whether the absent party is "necessary." If the absent party is
25 "necessary," the court must determine whether joinder is "feasible." Finally, if joinder is not
26 "feasible," the court must decide whether the absent party is "indispensable," i.e., whether
27 in "equity and good conscience" the action can continue without the party. U.S. v. Bowen,
28 172 F.3d 682, 688 (9th Cir. 1999) (citing Fed. R. Civ. P. 19).

1 A party is “necessary” either when the absence of the party would preclude the
 2 district court from fashioning complete and meaningful relief as between the parties, or
 3 when the absent party's participation is necessary to protect its legally cognizable interests
 4 or to protect existing parties from a significant risk of incurring multiple or inconsistent
 5 obligations because of those interests. See Fed. R. Civ. P. 19(a)(1), (2)(i) & (ii); see also
 6 Schnabel, 302 F.3d at 1029-30; Yellowstone County v. Pease, 96 F.3d 1169, 1172 (9th Cir.
 7 1996). These two grounds must be analyzed separately, and if either applies, the party is
 8 deemed “necessary.” Yellowstone, 96 F.3d at 1172.

9 If a party is “necessary” and cannot be joined, “the court must determine whether, in
 10 equity and good conscience, the action should proceed among the existing parties or
 11 should be dismissed.” Fed. R. Civ. P. 19(b). Factors for the court to consider include the
 12 extent to which a judgment rendered in the person’s absence might prejudice that party or
 13 existing parties; the extent that such prejudice could be lessened or avoided by protective
 14 provisions in the judgment, shaping the relief or other measures; whether judgment
 15 rendered in the person’s absence would be adequate; and whether the plaintiff would have
 16 an adequate remedy if the action were dismissed for non-joinder. Id.

17 Under California law, a cause of action for wrongful death is a statutory claim. Cal.
 18 Civ. P. Code §§ 377.60-377.62. Its purpose is to compensate specific persons – that is,
 19 heirs – for the loss of companionship and other losses suffered as a result of a decedent’s
 20 death. Jackson v. Fitzgibbons, 127 Cal. App. 4th 329, 335 (2005). Only the persons
 21 enumerated in § 377.60 have standing to assert a wrongful death claim. Section 377.60
 22 provides in part that

23 [a] cause of action for the death of a person caused by the wrongful act or
 24 neglect of another may be asserted by any of the following persons or by the
 25 decedent's personal representative on their behalf: (a) The decedent's
 26 surviving spouse, domestic partner, children, and issue of deceased children,
 or, if there is no surviving issue of the decedent, the persons . . . who would
 be entitled to the property of the decedent by intestate succession.

27 Cal. Civ. P. Code § 377.60(a). Each child has a personal and separate cause of action,
 28 and a separate rather than joint interest. Ruttenberg v. Ruttenberg, 53 Cal. App. 4th 801,

1 806-07 (1997).

2 However, the wrongful death cause of action is considered joint and indivisible
3 because “it is subject to the requirement that all heirs should join in the action and . . .
4 damages awarded should be in a lump sum,” and because it precludes omitted heirs from
5 bringing subsequent and individual actions for the recovery of their individual damages.
6 Helling v. Lew, 28 Cal. App. 3d 434, 438 (1972). An heir who files a wrongful death action
7 is required to properly join all known heirs in the action. Cross v. Pacific Gas & Elec. Co.,
8 60 Cal. 2d 690, 692-93 (1964); Ruttenberg, 53 Cal. App. 4th at 808.

9 Thus, the United States argues, disposition of this action may, as a practical matter,
10 impair or impede decedent’s non-party children William B. Burkhardt and Lisa A. Haran from
11 protecting their interest, or may leave the United States subject to a risk of multiple or
12 otherwise inconsistent obligations by reason of the children’s interest.

13 The United States concedes that William B. Burkhardt and Lisa A. Haran did not
14 timely file an administrative claim related to decedent’s death, and cannot, because the
15 FTCA statute of limitations has run; but argues that until they are joined as parties to this
16 action, a determination of whether they are barred from asserting a wrongful death claim
17 cannot be made, leaving defendant and the court susceptible to multiple lawsuits on the
18 same cause of action.

19 The United States appears to be asserting that because omitted heirs are
20 “necessary parties” under California law, all decedent’s children must be joined in this
21 action; but that because William B. Burkhardt and Lisa A. Haran failed to file a timely
22 administrative claim, the court would not have jurisdiction over them if they were joined,
23 and thus, the wrongful death claim asserted by Sally Burkhardt must be dismissed.

24 In opposition, plaintiffs contend that the wrongful death claims brought by Sally
25 Burkhardt on behalf of decedent’s family “have been triggered by enough notice provided on
26 the Standard Form as filed in this action.” They also assert that Sally Burkhardt “is in the
27 process of completing the formal estate papers to provide this court with assurances that
28 she has the proper authority to make decisions on behalf of the estate.”

1 The motion to dismiss the wrongful death claim for failure to join a necessary party is
2 DENIED. As indicated above, under Rule 19(a)(1), a party is necessary either if complete
3 relief is not possible without the absent party's presence, or if the absent party claims a
4 legally protected interest in the action. Ordinarily in a wrongful death action brought under
5 California law, all heirs must join, and complete relief is not possible without the presence
6 of all the heirs. Thus, the missing heirs may be considered necessary.

7 However, joinder is not feasible. The two absent heirs cannot file wrongful death
8 claims against the United States, because they did not submit administrative claims within
9 two years of decedent's death. Thus, the court must consider whether the missing heirs
10 are indispensable – whether in equity and good conscience the action can continue without
11 the missing heirs. Fed. R. Civ. P. 19(b).

12 Factors for the court to consider under Rule 19(b) include the extent to which a
13 judgment rendered in the person's absence might prejudice that party or existing parties;
14 the extent that such prejudice could be lessened or avoided by protective provisions in the
15 judgment, shaping the relief, or other measures; whether judgment rendered in the
16 person's absence would be adequate; and whether the plaintiff would have an adequate
17 remedy if the action were dismissed for non-joinder. Id.

18 Here, the missing heirs are not eligible for relief, and if any relief is to be awarded, it
19 could go only to Sally Burkhart and David Burkhart, who filed timely administrative claims
20 and the present lawsuit. Similarly, the missing heirs cannot claim an interest in the action.
21 Thus, a judgment rendered in their absence would not prejudice them or the existing
22 plaintiffs, and the absence of the missing heirs would not prevent the court from fashioning
23 meaningful relief.

24 b. Dismissal for lack of subject matter jurisdiction

25 The United States argues that the court lacks subject matter jurisdiction over Sally
26 Burkhart's claim of loss of consortium, because she failed to exhaust administrative
27 remedies. The Form 95 filed jointly by Sally Burkhart and David Burkhart, and signed by
28 Sally Burkhart, describes the injury in Block 10 as follows: "Veteran death resulted by

1 misdiagnosed medical treatment and lack of.” The United States notes that the focus in the
2 accompanying narrative is entirely on the assertions that decedent was prescribed the
3 wrong medication, that he was not admitted to the hospital when the family first requested
4 it, that his insulin levels were not checked sufficiently often, and that he was ultimately
5 moved into the hospice and was not provided adequate medical treatment after that point.

6 The United States asserts that these allegations are not sufficient to provide
7 adequate notice of a claim of loss of consortium, particularly given that Ms. Burkhart does
8 not identify herself as decedent’s widow, and does not mention emotional distress. Thus,
9 the United States contends, Sally Burkhart failed to exhaust administrative remedies as to
10 her claim of loss of consortium.

11 The motion to dismiss Sally Burkhart’s claim of loss of consortium is DENIED. As
12 noted above with regard to the motion to dismiss David Burkhart’s claim of loss of
13 consortium, the FAC does not plead a separate cause of action for loss of consortium, and
14 non-economic damages for loss of consortium are available in wrongful death actions
15 under California law. The Form 95 requests the claimant to state the amount of the
16 monetary claim, but does not request information regarding non-economic damages. Non-
17 economic damages are available in FTCA cases alleging medical malpractice. See
18 Schwarder v. United States, 974 F.2d 1118, 1125 (9th Cir. 1992).

19 3. Survival claims by decedent’s Estate

20 Finally, the United States argues that the survival claims by the Estate should be
21 dismissed for lack of subject matter jurisdiction, for two reasons. The United States
22 contends that the survival claims were not properly exhausted, and also asserts that Sally
23 Burkhart lacks standing to bring the survival claims.

24 a. Dismissal for lack of subject matter jurisdiction – failure to exhaust

25 The United States argues that the survival claims must be dismissed because Sally
26 Burkhart did not file a separate administrative claim on behalf of the Estate. The United
27 States asserts that nothing in either Form 95 states a value for the survival claim, as
28 distinguished from the claim for wrongful death; and nothing states that Sally Burkhart is

1 filing as a representative of the Estate, or identifies Ms. Burkhart's relationship to decedent.
2 Accordingly, the United States contends, because no administrative claim for decedent's
3 survival claims has been filed, the court lacks subject matter jurisdiction.

4 At the hearing, plaintiffs clarified that they intended the Form 95 that listed "Dave
5 Burkhart" as the claimant to serve as the survival claim on behalf of the Estate. It is true
6 that Sally Burkhart did not identify herself as the personal representative of the Estate or as
7 decedent's successor in interest when she signed the form. Nevertheless, the court finds
8 that the Form 95 adequately provided notice of the Estate's claim. Accordingly, the motion
9 is DENIED.

10 b. Dismissal for lack of subject matter jurisdiction – lack of standing

11 The United States argues that Sally Burkhart lacks standing to assert the survival
12 claims on behalf of the Estate, contending that the FAC fails to allege that she is
13 decedent's personal representative, and fails to allege any of the facts required to be stated
14 in order to assert an action as a decedent's successor in interest.

15 Under California law, "survival actions" are distinguished from "wrongful death"
16 actions. As explained above, a wrongful death action is an independent claim brought by a
17 decedent's heirs for damages they personally suffered on account of the death. See Cal.
18 Civ. P. Code § 377.60. A survival action, on the other hand, is not a new cause of action
19 that vests in the heirs on the death of the decedent. Rather, it is a separate and distinct
20 personal injury action that belonged to the decedent before death, but which, by statute,
21 "survives" to the decedent's estate for the purpose of recovering damages that would have
22 been available personally to the decedent had he or she lived. Quiroz, 140 Cal. App. 4th at
23 1264; see Cal. Civ. P. Code § 377.20.

24 "A cause of action that survives the death of the person entitled to commence [it]
25 . . . may be commenced by the decedent's personal representative, or, if none, by the
26 decedent's successor in interest." Cal. Civ. P. Code § 377.30. The California Probate
27 Code defines "personal representative" as "executor, administrator, administrator with the
28 will annexed, special administrator, successor personal representative, public administrator

1 acting pursuant to [Probate Code] section 7660, or a person who performs substantially the
2 same function of another jurisdiction governing the person's status." Cal. Probate Code
3 § 58(a).

4 The "decendent's successor in interest" is "the beneficiary of the decedent's estate or
5 other successor in interest who succeeds to a cause of action or to a particular item of
6 property that is the subject of a cause of action." Cal. Civ. P. Code § 377.11. The
7 "successor in interest" may prosecute the survival action if the person purporting to act as
8 successor in interest satisfies the requirements of California law. Cal. Civ. P. Code
9 §§ 377.30, 377.32; Tatum v. City and County of San Francisco, 441 F.3d 1090, 1094 (9th
10 Cir. 2006).

11 A person seeking to file an action as a decedent's successor in interest must attest
12 to certain facts showing that the person is in fact the decedent's successor in interest. Cal.
13 Civ. P. Code § 377.32. The proposed "successor in interest" must execute and file an
14 affidavit or declaration under penalty of perjury, stating: (1) the decedent's name; (2) the
15 date and place of decedent's death; (3) that no proceedings are pending in California for
16 the administration of the decedent's estate; (4) either that the declarant is the decedent's
17 successor in interest or is authorized to act on behalf of the decedent's successor in
18 interest; and (5) that no other person has a superior right to commence the action or
19 proceeding for the decedent. Id. In addition, the declarant must attach a certified copy of
20 the death certificate; if the decedent's estate was administered, the declarant must also
21 produce a copy of the final order showing distribution of the decedent's cause of action to
22 the successor in interest. Id.

23 The party seeking to bring a survival action bears the burden of demonstrating that a
24 particular state's law authorizes a survival action and that the plaintiff meets the state's
25 requirements for bringing a survival action." Moreland v. Las Vegas Metro. Police Dep't,
26 159 F.3d 365, 369 (9th Cir. 1998).

27 Here, Sally Burkhart alleges in the FAC that she submitted an administrative claim
28 as the administrator of the Estate, as well as on behalf of herself. FAC ¶ 25. At the

1 hearing, she conceded that she has not yet been appointed decedent's personal
2 representative by the Superior Court of California. She indicated that she was in the
3 process of obtaining "formal estate papers" that will show that she has standing to
4 represent the survival claims.

5 As noted above, California's survival statute allows a successor in interest to bring a
6 claim on behalf of the decedent when the decedent does not have a personal
7 representative. However, Sally Burkhart has also not filed the declaration required under
8 Civil Procedure Code § 337.32 to establish her right to proceed as decedent's successor in
9 interest.

10 The issue before the court is whether Sally Burkhart may assert claims on behalf of
11 the Estate. Her ability to assert claims on behalf of the Estate is not a question of standing.
12 In order to establish standing to sue, a plaintiff must show "injury in fact," causation, and
13 redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). According to
14 the allegations in the FAC, the Estate can show a direct injury traceable to the alleged
15 negligent medical treatment.

16 The question whether Sally Burkhart has the ability to assert claims on behalf of the
17 Estate involves the determination whether she has the capacity to bring suit as a
18 representative. See generally Wright, Miller & Kane, Federal Practice and Procedure: Civil
19 2d (1990 & 2007 Supp.) §§ 1542-1544. Lack of capacity to sue is not a jurisdictional
20 defect. See De Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 878 & n.4 (9th Cir.
21 2000). Therefore, unless the objection is properly raised, the court may proceed to
22 adjudicate the case notwithstanding this defect. Schwarzer, Tashima & Wagstaffe, Federal
23 Civil Procedure Before Trial (2008) § 7:50.

24 Here, the United States has not specifically challenged Sally Burkhart's capacity to
25 bring this action on behalf of the Estate. However, the court will interpret the arguments
26 regarding lack of standing as arguments regarding lack of capacity. Ordinarily, if a plaintiff
27 has failed to allege capacity to sue, the court would grant the motion to dismiss, with leave
28 to amend. Rather than directing plaintiffs to file a second amended complaint at this point,

1 however, the court orders Sally Burkhart to file a declaration establishing that she has the
2 capacity to proceed on behalf of the Estate.

3 **CONCLUSION**

4 The United States' motion is DENIED, with the exception of the motion to dismiss
5 the Estate's survival claim for lack of standing, which the court interprets as a motion to
6 dismiss for lack of capacity to sue. That motion is GRANTED.

7 No later than September 17, 2008, Sally Burkhart shall file a declaration under
8 penalty of perjury, establishing capacity to sue on behalf of the Estate. The declaration
9 must either attach documents from the Superior Court showing that she has been
10 appointed decedent's personal representative, or it must include the information required
11 under Civil Procedure Code § 377.32, as detailed above.

12 No later than three weeks following the filing of the declaration by Sally Burkhart, the
13 United States may, if it wishes, file a second motion to dismiss, addressing any perceived
14 deficiencies in the showing of capacity to sue, and also addressing (with citations to
15 authority) the questions raised by the court regarding Sally Burkhart's authority to sign the
16 Form 95 on David Burkhart's behalf, and regarding whether plaintiffs met the "sum certain
17 damages claim" requirement and whether the wrongful death claims are time-barred.

18
19 **IT IS SO ORDERED.**

20 Dated: August 26, 2008



21 _____
22 PHYLLIS J. HAMILTON
23 United States District Judge
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